

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-210215

DATE: June 20, 1983

MATTER OF: Quality Diesel Engines, Inc.

DIGEST:

Protest against sole-source nature of procurement is denied, since contracting agency does not possess or have rights in technical data necessary for competitive procurement and protester has not shown that performance could be accomplished without data.

Quality Diesel Engines, Inc. (QDE) protests the Navy's sole source award of a contract to Fairbanks Morse Engine Division of Colt Industries Operating Corporation, for the overhaul of three shipboard diesel engines under solicitation No. N00406-83-R-0904. QDE contends that it should have been afforded the opportunity to participate in the procurement, and alleges that certain provisions of the solicitation otherwise are unduly restrictive. We deny the protest.

The determination to negotiate a sole-source contract was based on the following findings by the contracting officer:

"Shipboard equipment was manufactured by [Fairbanks] and they possess the specialized knowledge required to repair, inspect, operate the equipment, evaluate the engine performance, provide all required parts and advise in resolving deficiencies. [Fairbanks] has accomplished previous diesel engine overhauls for the U.S. Navy * * * and has demonstrated proven proficiency. * * * [Fairbanks] holds the proprietary drawings and in-process procedures. Other vendors do not have access to these. Other vendors have to request repair parts from [Fairbanks]."

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The Navy's requirement was synopsisized in the Commerce Business Daily on October 28, 1982 as a sole-source procurement. On November 3, QDE contacted the contracting officer and, stating that it also was qualified to perform the overhaul work, requested a copy of the determinations and findings (D & F) justifying a sole-source procurement. While the contracting officer told QDE to request the D & F under the provisions of the Freedom of Information Act (FOIA), she did send the firm a copy of the solicitation on November 4. The contracting officer further advised QDE that it could submit an offer for evaluation.

QDE subsequently requested five technical manuals referenced in the solicitation which, under the terms of the solicitation, were to be provided to the contractor on request to accomplish the overhaul. The contracting officer erroneously denied QDE access to the manuals because she believed that they contained data proprietary to Fairbanks. These manuals subsequently were determined not to contain proprietary data, and were released to QDE in response to an FOIA request. The Navy found that although the manuals listed and referenced proprietary documents, all proprietary data actually was in Fairbanks' possession.

Meanwhile, Navy technical personnel, while still maintaining that access to the proprietary drawings and procedures only referenced in the technical manuals were indispensable to proper performance of the contract work, agreed to consider proposals from other firms which could otherwise prove their ability to perform the overhaul work. The Navy so advised QDE. The Navy states, however, that QDE never offered proof of its ability to perform the overhaul, such as by submitting a list of prior contracts or other convincing technical information. Instead, QDE filed a protest first with the Navy and then with our Office.

On November 23, an urgency statement was submitted by the requisitioning activity requesting that award be made immediately to avoid delays in the critical undocking date of the Navy ship requiring overhaul. Award was made to Fairbanks on December 2.

In determining the propriety of a sole-source solicitation, the standard to be applied is one of

reasonableness--unless it is shown that the contracting agency acted without a reasonable basis, this Office will not question the sole-source award. Bingham Ltd., B-189306, October 4, 1977, 77-2 CPD 263. We consistently have held that where adequate data is not available to an agency to enable it to conduct a competitive procurement, we will not take exception to a sole-source award to the only firm which the agency believes capable of performing the work. See Engineering Research, Incorporated, B-180893, September 12, 1974, 74-2 CPD 161.

The Navy maintains that Fairbanks' proprietary drawings are indispensable to the proper overhaul of these engines, and points out that at least some of these drawings were referenced in the technical manuals that were listed in the solicitation and which the protester ultimately received. QDE simply asserts that contrary to the Navy's position the proprietary data referenced in the contracting officer's D & F consists only of the technical manuals, not drawings, and questions the complexity of the overhaul work to be performed. The firm has not, however, presented any actual evidence rebutting the Navy's position that proprietary drawings in the possession of Fairbanks are needed for performance. (The Navy states that the engines were manufactured by Fairbanks under a previous contract in which the Navy did not obtain unlimited rights to the drawings.)

The protester has the burden of affirmatively proving its case. Reliable Maintenance Services, Inc.--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. In the face of the Navy's D & F that adequate performance cannot be obtained without access to proprietary drawings, the protester has offered no evidence showing that adequate data was available to the Navy to conduct a competitive procurement or that contract performance could be accomplished without the proprietary data of Fairbanks. Accordingly, we have no basis to disturb the Navy's source selection decision.

Finally, QDE protests an amendment to the solicitation that changed the responsibility for certain testing from the Government to the contractor, and claims that the Navy's specifications requiring specified gear for removal and reinstallation of the engines, repair of the engines under the supervision of a Fairbanks-trained mechanic, and

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repair of certain equipment attached to engines, are unduly restrictive of competition. We have, however, concluded that the Navy properly awarded a sole-source contract to the only firm capable of performing the work under the circumstances. Thus, QDE's assertions are academic, since they have no effect on the selection of the contractor. QDE, which has not shown that any of the work could be accomplished without the proprietary data, was not prejudiced by any of these sole-source solicitation's specifications. See JVAN, Inc., B-202357, August 28, 1981, 81-2 CPD 184.

The protest is denied.

for Milton J. Jordan
Comptroller General
of the United States